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## NOTE AND COMMENT

STATUTE REQUIRING EXAMINATION AND LICENSE AS PREREQUISITES TO OWNERSHIP OR MANAGEMENT OF A DENTAL OFFICE UNCONSTITUTIONAL.—A statute of the state of Washington provides, not only that any person or persons seeking to practice dentistry within the state shall be examined and licensed by the state board of dental examiners, but also that the same requirement shall be imposed upon any person or persons who own, operate or manage a dental office, or place for the practice of dentistry within the state. This statute, so far as it provides for an examination and license as prerequisites for the practice of dentistry within the state, has been held by the Supreme Court of the state to be a proper exercise of the police power and to be constitutional. See *State ex rel. Smith* v. *Board of Dental Examiners*, 31 Wash. 492, 72 Pac. Rep. 110; *In re Thompson* (Dec. 22, 1904), 78 Pac. Rep. 899; *State* v. *Sexton* (Feb. 18, 1905), 79 Pac. Rep. 634; *State* v. *Brown* (Feb. 18, 1905), 79 Pac. Rep. 638. But the requirement of an examination and license for the owner or manager of a dental office was successfully challenged in the recent case of *State* v. *Brown*, 79 Pac. Rep. 635, on the ground that it was an interference with individual rights not justified by any public necessity. The court suggests "that the police power may curtail the rights of the individual in so far as, and no farther than, the free exercise thereof is calculated to infringe upon the rights of others"; that "ordinarily a natural and constitutional personal right or privilege may be limited only

when its free exercise threatens or endangers the moral or physical well being of others or their property," and holds that, while reasonable restrictions as to qualifications may properly be imposed as to professions or callings whose exercise by ignorant and unskilled persons would put in jeopardy the rights or well being of those who might seek their aid, such personal restrictions cannot properly be imposed ordinarily as conditions precedent to the owning and managing of property. The public necessity for such restrictions cannot arise out of the mere fact of ownership and management. "Does the police power," says the court, "authorize the enactment of a statute making this requirement? We feel constrained to hold that it does not. It is solicitude for the physical well being of the public, or that portion that may need dentistry work, which justifies that part of the statute providing for the examination and licensing of those who desire to 'treat diseases or lesions of the human teeth or of jaws or correct malpositions thereof.' To perform such work with safety and proper regard for health and comfort, the operator must possess technical knowledge and skill peculiar to the study and practice of dentistry. Can the same be said of one desiring to own, run or manage a dental office? We think not. To own and manage property is a natural right, and one which may be restricted only for reasons of public policy, clearly discernible. To hold this portion of the statute valid would be to make possible conditions which were never designed to exist." By way of illustration, the court suggests that if a man legally licensed as a dentist should die, leaving his dental office and equipment to his wife, then she, if unable through lack of technical learning to comply with the statute, would, if the part of the statute under consideration is valid, by continuing to own the property for any appreciable time, become liable to criminal prosecution. And the court very properly concludes that neither the police nor any other power can, under the law, be invoked to bring about such a result.

The decision in this case is certainly a wholesome one, as it must help in some degree to check the growing tendency to create state examining boards for purposes that cannot be justified as a proper exercise of the police power. It is a well understood fact that such boards are frequently created solely for political purposes. The Washington court in a recent case, *In re Aubry* (Dec. 20, 1904), 78 Pac. Rep. 900, passed upon substantially the same question, when it declared a statute unconstitutional that required horseshoers to pass an examination and secure a license before exercising the calling. The Illinois Supreme Court and the Appellate Division of the New York Supreme Court had previously reached the same conclusion in considering similar statutes. *Bessette* v. *People,* 193 Ill. 334, 62 N. E. Rep. 215, 56 L. R. A. 558; *People* v. *Beattie,* 96 App. Div. (N. Y.) 383, 89 N. Y. Supp. 193. But it may be suggested, as bearing upon the other side of the question, that the New York Court of Appeals, by a divided court, has sustained a statute which provides for the creation of a board for the examination of plumbers, and which prohibits any person from exercising the calling of a master plumber without an examination before such board and a certificate as to his competency. *People* v. *Warden of the City Prison,* 144 N. Y. 529, 39 N. E. Rep.

686, 27 L. R. A. 718. And that the business of plumbing is a proper subject for regulation under the police power is the conclusion of the Supreme Court of Minnesota, although in the recent case in which this conclusion is expressed, the statute under examination was declared unconstitutional because of its arbitrary basis of classification as to cities to which the act was to apply and because of an unjustifiable distinction between master plumbers and journeyman plumbers. *State* v. *Justus,* 90 Minn. 474, 97 N. W. Rep. 124. Further it has been held to be a proper exercise of the police power for the state to provide for the examination and licensing of barbers: *State* v. *Zeno,* 79 Minn. 80.

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RAILROAD CONTROL OF THE TELEGRAPH BUSINESS.—A decision of the Supreme Court of the United States, recently rendered, has given to the railroads, already powerful enough to practically defy the national government, so vast an increase of power, that Congress might well endeavor to undo by legislation what has just been established by judicial decision. In this case, *Western Union Telegraph Co.* v. *Pennsylvania Railroad Co.,* 25 Sup. Ct. Rep. 133, the court has construed the Act of 1866, which granted to telegraph companies "the right to construct, maintain, and operate lines of telegraph * * * over and along any of the military or post roads of the United States," as conferring such right subject to the consent of the railroad company owning the right of way constituting any such post road. It holds, in other words, that a telegraph company has no right of eminent domain enabling it to enter upon railroad property and appropriate a location for its poles, *in invitum,* even though its poles and wires do not interfere with the ordinary travel on such post road, thus satisfying the proviso in the act.

In this case the Western Union Telegraph Co. had occupied with its poles and wires the right of way of the Pennsylvania Railroad Co., under a twenty-year contract which provided that at the expiration of the period the telegraph company should, if notified in writing by the railroad company, remove its poles and wires from the railroad right of way. Such notice was in fact given, the railroad company having made a contract with the Postal Telegraph Co. to allow it to maintain a telegraph line upon its right of way. Whereupon, the Western Union Co., after fruitless efforts to effect a settlement, took the position that since Congress, by the Act of 1866, gave it the *"right"* to maintain and operate its lines along railroad rights of way, it could exercise the right of eminent domain; and it proceeded to bring itself within the statute, and instituted proceedings to estimate the compensatory damages to be paid to the railroad company.

The court, in denying the plaintiff the right to maintain and operate its telegraph line without the consent of the railroad company, declared that the case was controlled by two prior decisions, viz., *Pensacola Telegraph Co.* v. *Western Union Telegraph Co.,* 96 U. S. 1, and *Western Union Telegraph Co.* v. *Ann Arbor Railroad Co.,* 178 U. S. 239. But it is very difficult to see how these cases could be deemed authority for the position taken, as Mr. JUSTICE HARLAN points out in his dissenting opinion. The *Pensacola* case involved simply the question whether a telegraph company, authorized by contract